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U.S. Citizenship
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Services

Be

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: SEP 09 2004

IN RE:

Petitioner:
Beneficiary

[Redacted]

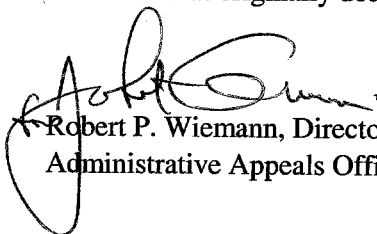
PETITION: Immigrant petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care home. It seeks to employ the beneficiary permanently in the United States as a household domestic worker/caregiver. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had failed to establish that the beneficiary had the requisite three months work experience required by the offered position.

On appeal, counsel submits additional evidence and asserts that it establishes the beneficiary's eligibility for the position offered.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is February 14, 2000. The visa petition indicates that the petitioner was established in 1981 and has two employees. Part B of the ETA-750, signed by the beneficiary, reflects that the petitioner has employed the beneficiary since 1993.

As noted on Part A, item 14 of the approved labor certification (ETA-750), the beneficiary must have 3 months of experience in the job offered of household domestic worker/caregiver. Item 15 of the labor certification lists other special requirements that an applicant for the job of household domestic worker/caregiver must possess. It, in part, includes the requirement that an applicant "must obtain first aid, CPR, [and] a health screening report issued by the State of California Health and Welfare Agency. . ."

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) Other documentation—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

* * *

(D) *Other worker.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

Because the record did not initially contain sufficient documentation in support of the petitioner's continuing ability to pay the proffered wage, as well as evidence to establish that the beneficiary possesses the employment experience specified on the labor certification, the director requested additional evidence on October 9, 2002, including verification that the beneficiary possesses the necessary first aid, CPR, and health screening report specified in the approved labor certification.

In response, the petitioner, through counsel, submitted copies of the beneficiary's first aid and CPR certification issued in January 1993, although the petitioner did not submit a health screening report. In support of her past employment experience as a household domestic worker/caregiver, the petitioner submitted a copy of a certification from a U.S. Navy official at Cubi Point in the Philippines, stating that the beneficiary had worked as a laundrywoman from October 1981 until February 1992.

In denying the petition, the director found that the employment certification, submitted by the petitioner from the U.S. Navy, failed to establish any prior work experience as a household domestic worker/caregiver.

On appeal, counsel asserts that the beneficiary actually did work as a household domestic worker/caregiver for the required three months prior to the visa priority date. Counsel attaches a declaration from the beneficiary explaining that she worked for a rest home in San Jose, California, run by Ms. Mercy Broberg. The beneficiary states that she worked for this facility as a caregiver for "around seven months." She then states that this employment began October 1, 1992 and ran until June 15, 1993. She declares that her attorney was unable to get verification from Ms. Broberg, because the beneficiary had worked without immigration authorization, and Ms. Broberg did not want any further involvement.

Along with the beneficiary's declaration, counsel submits a copy of a 1993 health screening report, dated February 1, 1993, and a fingerprint card that the beneficiary obtained in connection with the Broberg employment, as well as copies of the CPR and first aid training certificates that were previously submitted in response to the director's request for additional evidence. Both the health screening report and the fingerprint card reference the Broberg facility. The health screening report also states the beneficiary's duties as cooking, cleaning, and caring for the elderly. The days worked per week state "5." The health screening report appears to also state "five" in the box labeled "work hours per day."

Although the documentation, submitted on appeal, appears to suggest that the beneficiary may have been employed by the Broberg facility around 1993, they do not corroborate the exact timeframe and duration of the beneficiary's employment. The beneficiary's self-serving statement on appeal does not provide a sufficient basis, standing alone, to conclude that she has fulfilled the terms of the proffered position as delineated on the approved ETA-750A. It is further noted that the ETA-750B, signed by the beneficiary, omits mention of this job altogether and characterizes her job with the U.S. Navy in the Philippines as a "household domestic worker" engaged in the care of elderly residents. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Doubt cast on any aspect of the petitioner's proof, may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N DEC. 582, 591-92. (BIA 1988). Without corroboration as required by 8 C.F.R. § 204.5(1)(3)(D), the AAO does not find that the beneficiary's own evidence sufficiently credible to overcome the basis for the director's denial of the petition. CIS must look to the labor certification to determine the qualifications for the position. It may not ignore a term of the labor certification, nor may it impose

additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In this case, the record fails to establish that the beneficiary has at least three months of employment experience as a household domestic worker/caregiver required by the terms of the labor certification. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner has not established that the beneficiary meets the requirements of the approved labor certification as of the petition's priority date, the petition may not be approved.

Beyond the decision of the director, it is noted that the evidence submitted does not appear to completely substantiate the petitioner's continuing ability to pay the beneficiary's proffered wage pursuant to the requirements set forth in 8 C.F.R. § 204.5(g)(2). The beneficiary's proposed wage offer is \$1,270.73 per month, or \$15,248.76 per year. The petitioner must establish the ability to pay this proposed wage as of the visa priority date of February 14, 2000 and continuing until the beneficiary obtains lawful permanent resident status. The record shows that the petitioner paid the beneficiary \$14,750 in 2001, slightly less than the proffered wage. The 2001 federal tax return (Form 1040) of the petitioner's sole proprietor reflects an adjusted gross income of -\$14,120, which was not sufficient to cover the difference between the proffered salary and the wages actually paid to the beneficiary. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Although the record contains a copy of a savings account statement from November 2002, showing a substantial sum, there is no other information pertinent to 2001, to substantiate the petitioner's continuing ability to pay the beneficiary's proffered salary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.